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Client Alert

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U.S. Supreme Court's Koontz[1] Decision Seemingly Broadened Landowner Protection in the Realm of Regulatory Takings Law, While Leaving Several Intriguing Questions Unanswered

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Most media coverage of the Supreme Court's recently concluded term focused on cases dealing with marriage equality, affirmative action, and voting rights. In the noise created by that backdrop, a significant land use case attracted less notice than it probably deserved. Among other things, that case[1] applied the teachings of *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374[2] to fee exaction cases when many state cases, including those in California, have held that those cases do not apply to anything other than exactions of interest in property imposed as a condition to permit approval or other entitlements.

Overview of *Nollan-Dolan's* Nexus And Rough Proportionality Analysis

A brief summary helps to place the case in context. In *Nollan*, the Supreme Court held that a governmental agency could not require dedication of a property interest as a condition to approval of a permit unless the exaction had a reasonable connection—or nexus—with the impact that the approved project would cause. This differs from exactions where a local governing body seeks to impose easements or other dedications required to rectify a *pre-existing* condition, rather than a condition caused by the project being permitted.

Under *Nollan*, such an exaction would be unconstitutional for lack of nexus. In *Dolan*, the Supreme Court expanded on *Nollan* by holding that in addition to nexus, the exaction must be roughly proportional to the impact that the approved project would create.

Thus, a lead agency may not require dedication of a freeway interchange simply because development on a small parcel in the vicinity would generate traffic that would use that interchange. Under *Dolan*, such an exaction would be unconstitutional for not being roughly proportional to the impact the project causes.

Supreme Court's Holding and Reasoning in the *Koontz* Case

Koontz extended the *Nollan-Dolan* analysis to cases where the approving agency seeks a fee or other monetary consideration intended to mitigate impacts as a condition of a permit, rather than an easement or an interest in real property.[3] This change may have more significance in states other than in California, as California has adopted the *Nollan-Dolan* analysis legislatively. (Cal. Gov't Code §§ 66000, *et seq*.) But other aspects of the *Koontz* decision materially change the traditional analysis of the takings issue in the context of the entitlement process. Understanding these issues requires more information about the facts of the case.

The *Koontz* case involves at 15-acre wetland in Orange County, Florida that is owned by the estate of Coy Koontz, a seasoned real estate developer who sought permits in 1993 to prepare his land for commercial development. As part of the permitting application process, Koontz offered to grant a conservation easement over nearly three-quarters of his property to the St. John River Water Management District (the "District") to offset any environmental damage his development might cause. The District rejected Petitioner's offer. It stated that it would issue the permit Koontz sought only if Koontz (1) reduced the scope of the proposed project and granted a larger conservation easement, or (2) constructed and paid for improvements to separate and unrelated land the District owned.

Koontz then sued to challenge the District's actions under a state law that restricts an agency's ability to extract money damages for an "unreasonable exercise of the state's police power," thus, constituting a taking without just compensation. Koontz relied on the argument that the District's proposals failed to comply with the nexus and

[1] *Koontz v. St. John's River Water Management District* (June 25, 2013) ___ U.S. ___ Case No. 11-1447 ("*Koontz*")

[2] Hereinafter, respectively referred to as "*Nollan*" and "*Dolan,*" or collectively as "*Nollan-Dolan.*"

[3] *Koontz* dealt with a discretionary approval applied for and to be issued on an individualized basis in a quasi-adjudicative setting, where the conditions at issue were crafted on an *ad hoc* basis.

rough proportionality requirements imposed by the *Nolan-Dolan* cases. The trial court agreed. The Florida District Court of Appeal affirmed, but the Florida Supreme Court reversed the lower court's holding on two grounds:

1. *Koontz* is distinguishable from *Nollan* or *Dolan* because those cases dealt with conditions imposed on a permit actually issued, whereas no permit was issued in *Koontz,* as the District denied his request due to his failure to accede to it demands, and

2. *Koontz* involved a demand for money by the District rather than an interest in real property.

The U.S. Supreme Court reversed, stating that "extortionate demands for property in the land-use permitting context run afoul of the Takings Clause, not because they take property, but because they impermissibly burden the right not to have property taken without just compensation." A demand for money creates just such a burden. The Supreme Court found that the standards articulated in *Nollan-Dolan* apply not only to the classic "taking" scenario where a property owner is required to dedicate an interest in property, but also to monetary exactions. The holding prevents "...the government from coercing people into giving up their Constitutional rights." To hold otherwise, as the majority reasoned, would circumvent the nexus and rough proportionality standard, foundational principles of land use law for over three decades.

Though the Justices unanimously agreed that the "nexus" and "rough proportionality" tests applied to permit denials as well as conditioned approvals, the dissent warned that extending *Nollan-Dolan* to demands for money "threatens to subject a vast array of land-use regulations, applied daily in states and localities throughout the country, to heightened constitutional scrutiny."[4]

[4] The Supreme Court's holding concludes that nexus and rough proportionality requirements encompass all regulatory exactions, *i.e.*, those imposed as a condition to the grant of a permit or other land use entitlement. It is also clear that the Court did not intend to include property taxes within the scope of the decision. The Court emphasized that the "fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property."

Leaving the Door Open for Future Supremacy Clause Implications

The opinion touches upon, but does not explore, the interface between state and federal law, an integral part of takings jurisprudence. By referring critical questions to the Florida Supreme Court for decision under Florida state law, the Supreme Court sidestepped for now the question of the extent to which the Supremacy Clause requires it to critically examine the state court's conclusion for constitutional rectitude.

Although protected by the federal Constitution's Fifth and Fourteenth Amendments, property rights—their dimension and limitations—are defined by state law. Thus, federal courts defer to the states for that definition. In *Koontz* and in other cases, this deference can include referring questions of state substantive and procedural law to state courts for resolution before the Supreme Court will address questions that those answers might implicate. But historically, that discussion has made no mention or engaged in an attempt to reconcile the conclusions reached in that analysis with the so-called "Supremacy Clause," Article VI, Clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The U.S. Constitution and its ultimate interpreter, the Supreme Court, are in the paramount position and should not be screened away from important constitutional questions by patently erroneous or unlawful decisions purporting to define property rights made by inferior tribunals. Stated differently, the Supreme Court is not free to accept without analysis the conclusions that state courts and state law proclaim with respect to the boundaries of property rights or the limitations thereof when the decision on those questions implicates or undercuts important federal constitutional issues. At some point, comity and deference must give way to supremacy, if necessary to vindicate constitutional rights.

The *Koontz* decision relegates several questions that could have those kinds of constitutional implications on the Florida

State Supreme Court. The opinion gives no indication that the Justices of the Supreme Court reserve the right to examine those decisions with deference, to be sure, but without ceding their power to reject the conclusions if the Justices see them as clashing with overarching constitutional principle. Nor does the opinion articulate the guidelines the Supreme Court would follow in any such inquiry. It will be interesting to see how and if the Supreme Court will address that inherent, potential conflict.

A more interesting question, however, is whether or not the *Koontz* analysis would apply with equal force to legislatively imposed fees. In California, the courts decided to the contrary in *Russ Building Partnership v. City and County of San Francisco* (1987) 199 Cal.App.3d 1496 and *Blue Jeans Equities West v. City and County of San Francisco* (1992) 3 Cal.App.4th 164. Those cases were decided before the U.S. Supreme Court decision in *Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528.

In *Lingle*, the Supreme Court overruled the first prong of the takings test articulated in *Agins et ux v. City of Tiburon* (1980) 447 U.S. 255. In *Agins*, the Court stated that a legislative enactment or condition could constitute a taking if it did not advance a legitimate state interest. The *Lingle* court rejected that part of the *Agins* analysis, concluding that it was properly a due process question rather than a takings test. The sole test of taking should focus on the impact on the property owner.

That holding, extended to its logical conclusion, casts doubt on the continuing validity of the California Supreme Court decision in *Landgate, Inc. v. California Coastal Commission* (1998) 17 Cal.4th 1006, a case where the California Supreme Court excused a serious erroneous decision on the part of a governing body, essentially finding irrelevant the burden on the property owner and its property that the error had created.

If *Lingle* has the power and reach to overrule *Landgate,* then why not *Russ Building* as it also relies on the character of the governmental action with scant regard for the burden on the party regulated? Stated another way, the fact that an exaction has a legislative origin rather than as an *ad hoc* imposed condition should be irrelevant to the takings analysis after *Lingle*.

Whether the courts will ultimately so decide is an open question. As this issue is not lurking in the as yet undecided questions in *Koontz,* it will have to await a proper case. We suspect that the wait will not be a long one.

In the meantime, the *Koontz* litigation is far from over, as there will be proceedings in the Florida Supreme Court and presumably another trip to the Supreme Court. If the Supreme Court asserts the Supremacy Clause in its analysis of the decision by the Florida Supreme Court and/or if the Supreme Court provides any support at all for the idea that legislatively enacted entitlement fees are fair game now under the nexus and rough proportionality standards, either or both would constitute critically important developments in takings law, in addition to the result in *Koontz*.

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